A

Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–87 OF 2007
LOW HOP BING, ABDUL MALIK ISHAK AND SULAIMAN DAUD JJCA
15 MAY 2008

C

Civil Procedure — Discovery — Inspection of documents — Nature of discovery — Whether distinct from obtaining further and better particulars — Whether right to inspect documents includes right to take notes and photographs of documents — Whether party ordered to produce documents entitled to refuse inspection

D

Civil Procedure — Discovery — Order for — Jurisdiction and discretion of court — Whether court ought to make an order for discovery where case to the contrary shown — Rules of the High Court 1980 O 24

E

Civil Procedure — Discovery — Order for — Originating summons — Whether automatic — Whether prior order of court for discovery required

F

Civil Procedure — Discovery — Order for — Writ — Whether discovery in a writ action automatic — Whether prior order of court required

G

Constitutional Law — Citizenship — Proof of — Birth certificate and citizenship certificate — Production of — Whether production of such documents would constitute proof of citizenship — Whether citizenship could be proved by other means

H

Evidence — Burden of proof — Fact especially within knowledge of party in civil case — Whether burden of proving that fact on party having requisite knowledge — Evidence Act 1950 s 106

I

An armistice was executed between the Government of Malaysia and the Communist Party of Malaysia ('the CPM') on 2 December 1989. The armistice was signed by the respondents whereas the first appellant and two

others signed on behalf of the CPM. The armistice, inter alia, permitted Malaysian and non-Malaysian CPM members to settle down in Malaysia, subject to conditions. An administrative arrangement ('the arrangement') which clarified the substance of the armistice, was also executed between the same parties. This arrangement, inter alia, set forth the conditions the CPM members desirous of settling down in Malaysia had to fulfill. It also permitted CPM members of Malaysian citizenship to participate in political activities in Malaysia. The appellants, relying upon the armistice and arrangement filed three applications. In all three applications, the affidavits in support averred that the first appellant: (i) was born in Sitiawan, Dinding, Perak; (ii) was a Malaysian citizen; (iii) his parents, children and family were all Malaysian citizens; (iv) had never been deprived of his citizenship or banished from Malaysia; and (iv) had never relinquished his citizenship or had it revoked.

The respondents applied pursuant to O 24 of the Rules of the High Court 1980 ('RHC') for an order requiring the first appellant to file in court, within 14 days of the order, the requisite documents (birth certificate and the citizenship certificate) to prove that he was born in Malaysia or was a Malaysian citizen. The respondents further prayed that in the event the first appellant failed to do so, his three applications be dismissed with costs. The first appellant subsequently filed further affidavits, deposing, inter alia, to the following: (a) the relevant documents and certificates were issued by the respondents and should be in their possession; (b) he had been issued with a birth certificate and a passport, which documents had been seized by the police. These averments were denied by the Director of the Registration Department who affirmed in an affidavit that the Registration Department had no record of the birth of the first appellant at Sitiawan, Dinding, Perak and it had not issued a birth certificate to the first appellant. The High Court allowed the respondents' application and dismissed all three applications by the appellants. The High Court was of the view that the documents requested were relevant and related to the issues at hand. The High Court was also of the view that the first appellant's assertions that he was entitled to return to Malaysia was not based on the armistice but rather on the strength of him being a Malaysian citizen. Hence this appeal.

Held, dismissing the appeal with costs:

(1) In the instant case, the respondents were not on a fishing expedition as they had been very specific as to what they were requesting for disclosure (see para 21).

(2) In a writ action, discovery is automatic. There is no necessity, at all, for a prior order of the court. However, in the instant case, the proceedings were begun by originating summons and discovery was not automatic.

If discovery was required it had to be done by way of an order of the court, as applied for by the respondents (see para 23).

(3) Based on the facts, O 24 r 16(1) of the RHC should apply to the appellants. There was nothing wrong with the order of the High Court. The onus was on the first appellant to produce his birth certificate and his citizenship certificate. It was the first appellant who deposed in his own affidavit that he was born in October 1924 in Sitiawan, Dinding, Perak, Malaya and that he remained a Malaysian citizen. The first appellant also averred that he did not relinquish his citizenship and neither was he banished from Malaysia. Thus the onus was on him to show that that was so. He had to produce his birth certificate and citizenship certificate because the NRD had no record of it. The production of the first appellant's documents would certainly throw light to the case at hand and would support his claim (see paras 18 & 27).

(4) The first appellant's documents requested by the respondents related to the matters in question and were likely to throw light on the case at hand. Under O 24 r 10 of the RHC, the court has the jurisdiction to order discovery of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose affidavit the reference to that document is made. The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession, custody or power may amount to a good cause, but it is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case. Privilege may be a good cause not to allow discovery. In the instant case, privilege had not been raised by the first appellant. In any event, those documents could never be classified as privileged so as to prevent the first appellant from producing them (see para 38).

(5) If a person asserts affirmatively that a certain state of facts is present or absent, that would be an averment that he is bound to prove. Section 106 of the Evidence Act 1950 is an exception to s 101 of the same Act. In the instant case, it was especially within the knowledge of the first appellant who knew of the existence of his birth certificate and citizenship certificate and, consequently, the burden of proving that he had them was on him (see para 51).

(6) Further, the first appellant's documents were required in order to ascertain the issues of 'Malaysian citizen' or 'Malaysian origin'. It was imperative, in view of the affidavits of the officers from the Immigration and Registration Departments, that the first appellant should produce his documents for inspection. In this context, the High Court judge was

wrong when he acknowledged that one could prove one's Malaysian origin by other means (see para 56).

(7) The failure on the part of the first appellant to produce the documents sought by the respondents for inspection was fatal. Discovery was not given by the stated time and therefore the High Court was right in allowing the respondents' application under O 24 of the RHC (see para 59).

[Bahasa Malaysia summary

Satu perjanjian gencatan senjata telah dimeterai di antara Kerajaan Malaysia (kerajaan) dan Parti Komunis Malaysia ('PKM') pada 2 Disember 1989. Perjanjian gencatan senjata tersebut telah ditandatangani oleh responden-responden manakala perayu pertama dan dua yang lain menandatangani bagi pihak PKM. Perjanjian tersebut, antara lain, membenarkan ahli-ahli PKM warganegara Malaysia dan bukan warganegara Malaysia menetap di Malaysia, tertakluk kepada syarat-syarat. Suatu 'penyusunan pentadbiran' ('penyusunan tersebut') yang menjelaskan kandungan perjanjian gencatan senjata tersebut, juga telah dimeterai di antara pihak-pihak yang sama. Penyusunan ini, antara lain, menyenaraikan syarat-syarat yang perlu dipenuhi oleh ahli-ahli PKM yang ingin menetap di Malaysia. Ia juga membenarkan ahli-ahli PKM warganegara Malaysia untuk mengambil bahagian dalam aktiviti-aktiviti politik di Malaysia. Perayu-perayu, bersandarkan kepada perjanjian gencatan senjata dan penyusunan tersebut tersebut memfailkan tiga permohonan. Di dalam ketiga-tiga permohonan tersebut, afidavit menyokong menyatakan bahawa perayu pertama: (i) telah dilahirkan di Sitiawan, Dinding, Perak; (ii) seorang warganegara Malaysia; (iii) ibubapa, anak-anak dan keluarganya kesemuanya warganegara Malaysia; (iv) tidak pernah ditarik balik kewarganegaraannya atau dibuang negeri dari Malaysia; dan tidak pernah melepaskan kewarganegaraannya atau menyebabkannya dibatalkan.

Responden-responden memohon menurut A 24 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk perintah yang menghendaki responden pertama memfailkan di mahkamah, dalam tempoh 14 hari perintah tersebut, dokumen-dokumen yang perlu (sijil kelahiran dan sijil kewarganegaraan) untuk membuktikan bahawa beliau dilahirkan di Malaysia atau adalah warganegara Malaysia. Responden-responden selanjutnya memohon bahawa, jika perayu pertama gagal berbuat demikian, ketiga-tiga permohonan beliau ditolak dengan kos. Perayu pertama kemudian memfailkan afidavit lanjut, mendeposkan, antara lain, yang berikut: (a) dokumen-dokumen dan sijil-sijil yang relevan telah dikeluarkan oleh responden-responden dan sepatutnya berada dalam milikan mereka; (b) beliau telah diberikan sijil kelahiran dan pasport, yang telah dirampas oleh pihak polis. Kenyataan-kenyataan ini dinafikan oleh Pengarah Jabatan Pendaftaran yang mengesahkan di dalam

A afidavit bahawa Jabatan Pendaftaran tidak mempunyai rekod kelahiran perayu pertama di Sitiawan, Dinding, Perak dan ia tidak mengeluarkan sijil kelahiran kepada perayu pertama. Mahkamah Tinggi membenarkan permohonan perayu-perayu dan menolak ketiga-tiga permohonan oleh perayu-perayu. Mahkamah Tinggi berpendapat bahawa dokumen-dokumen B yang dikehendaki adalah relevan dan berkait dengan isu yang dikemukakan. Mahkamah Tinggi juga berpendapat bahawa penyataan-penyataan perayu pertama bahawa beliau berhak untuk pulang ke Malaysia tidak berdasarkan kepada perjanjian gencatan senjata tersebut tetapi atas kelayakannya sebagai warganegara Malaysia. Maka rayuan ini. C

Diputuskan, menolak rayuan dengan kos:

D (1) Di dalam kes ini, responden-responden bukan menangguk di air keruh kerana mereka amat spesifik terhadap apa yang diminta untuk didedahkan (lihat perenggan 21).

(2) Di dalam tindakan writ, penzahiran adalah automatik. Tidak ada keperluan langsung untuk perintah terdahulu mahkamah. Di dalam kes E ini, prosiding telah dimulakan dengan saman pemula dan penzahiran bukan automatik. Jika penzahiran diperlukan, ia perlu dilakukan dengan perintah mahkamah seperti yang dipohon oleh reponden-responden (lihat perenggan 23).

F (3) Berdasarkan fakta, A 24 k 16(1) KMT harus beraplikasi kepada perayu-perayu. Tiada apa yang salah dengan perintah Mahkamah Tinggi. Beban adalah di atas perayu pertama untuk mengemukakan sijil kelahirannya dan sijil kewarganegaraannya. Ia adalah perayu pertama yang menyatakan di dalam afidavitnya sendiri bahawa beliau dilahirkan G pada Oktober 1924 di Sitiawan, Dinding, Perak, Malaya dan bahawa beliau masih warganegara Malaysia. Perayu pertama juga menyatakan bahawa beliau tidak melepaskan kewarganegaraannya dan beliau juga tidak pernah dibuang negeri dari Malaysia. Oleh itu, beban adalah di atas beliau untuk membuktikannya. Beliau perlu mengemukakan H sijil kelahirannya dan sijil kewarganegaraannya kerana JPN tidak mempunyai rekod mengenainya. Pengemukaan dokumen-dokumen perayu pertama akan membantu dalam memutuskan kes ini dan akan menyokong tuntutannya (lihat perenggan 18 & 27).

I (4) Dokumen-dokumen perayu pertama yang diminta oleh responden berkait dengan perkara-perkara yang dipersoalkan dan kemungkinan boleh menolong dalam pemutusan kes ini. Di bawah A 24 k 10 KMT, mahkamah mempunyai bidang kuasa untuk mengarahkan penzahiran dokumen yang dirujuk di dalam afidavit, sama ada atau tidak dokumen tersebut ada dalam milikan, kawalan atau kuasa pihak yang mana

di dalam afidavitnya rujukan kepada dokumen tersebut dibuat. Budi bicara tersebut diletakkan kepada mahkamah sama ada atau tidak untuk membuat perintah untuk penzahiran. Perintah tidak akan dibuat jika alasan sebaliknya yang munasabah ditunjukkan. Ketiadaan milikan, kawalan dan kuasa boleh bermaksud kepada alasan yang baik, tetapi ia bukan selalunya begitu. Akhirnya, keputusan untuk mengarahkan penzahiran bergantung kepada fakta setiap kes. Keistimewaan boleh menjadi alasan yang baik untuk tidak membenarkan penzahiran. Dalam kes ini, keistimewaan tidak dibangkitkan oleh perayu pertama. Walau bagaimanapun, dokumen-dokumen tersebut tidak boleh sama sekali diklasifikasi sebagai istimewa sehingga menghalang perayu pertama daripada mengemukakannya (lihat perenggan 38).

(5) Jika seseorang menyatakan secara tegas bahawa keadaan sesuatu fakta itu ada atau tiada, ia adalah pernyataan yang beliau terikat untuk membuktikannya. Seksyen 106 Akta Keterangan 1950 adalah pengecualian kepada s 101 Akta yang sama. Di atas fakta, ia adalah khususnya dalam pengetahuan perayu pertama yang mengetahui mengenai kewujudan sijil kelahiran dan sijil kewarganegaraannya, dan oleh yang demikian beban untuk membuktikan bahawa beliau memilikinya adalah ke atasnya (lihat perenggan 51).

(6) Selanjutnya, dokumen-dokumen perayu pertama diperlukan untuk memastikan isu-isu 'Malaysian citizen' atau 'Malaysian origin'. Ia adalah penting, memandangkan kepada afidavit-afidavit pegawai-pegawai dari Jabatan-jabatan Imigresen dan pendaftaran, bahawa perayu pertama sepatutnya mengemukakan dokumen-dokumen untuk pemeriksaan. Di dalam konteks ini, hakim Mahkamah Tinggi telah terkhilaf apabila beliau mengakui bahawa seseorang boleh membuktikan dia berasal dari Malaysia melalui cara-cara yang lain (lihat perenggan 56).

(7) Kegagalan pada pihak perayu pertama untuk mengemukakan dokumen-dokumen yang diminta oleh responden-responden untuk pemeriksaan adalah menjejaskan. Penzahiran tidak diberikan dalam tempoh masa yang dinyatakan dan oleh yang demikian Mahkamah Tinggi adalah betul dalam membenarkan permohonan responden-responden di bawah A 24 KMT (lihat perenggan 59).]

Notes

For a case on fact especially within knowledge of party in civil case, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 449.

For cases on citizenship generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1866–1880.

For cases on inspection of documents, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2488–2497.

A For cases on order for discovery, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2506–2509.

Cases referred to

Compagnie Financiere Et Commerciale Du Pacifique, The v The Peruvian Guano Company (1882) 11 QBD 55 (refd)
Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan [2004] 6 MLJ 235 (refd)
Gobinda Mohan Das & Ors v Kunja Behary Dass & Ors [1909–1910] Calcutta Weekly Notes, volume XIV (refd)
Ho Tong Cheong & Ors v Oversea-Chinese Banking Corpn Ltd [1967] 2 MLJ 70 (refd)
Jagatbhai Punjabhai Palkhiwala & Ors v Vikrambhai Punjabhai Palkhiwala & Ors AIR 1985 Vol 72 Gujar (refd)
Khetsidas and Lachminarayan v Narotumdas Gordhandas & Anor [1908] ILR Bombay Series Vol XXXII (refd)
Lewis v The Earl of Londesborough [1893] 2 QB 191 (refd)
Mahfar bin Alwee v Jejaka Megah Sdn Bhd & Anor [2007] 4 MLJ 175; [2007] 7 CLJ 116 (refd)
Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd [2006] 4 MLJ 302 (refd)
Merchants' & Manufacturers' Insurance Co Ltd v Davies [1938] 1 KB 196 (refd)
Milbank v Milbank [1900] 1 Ch 376 (refd)
Pachkodi Gulab Badhai v Krishnaji & Ors AIR 1947 Vol 34 Nagpur 145 (refd)
Phoolchand Garg v Gopaldas Agarwal & Ors AIR 1990 Madras 135 (refd)
PPr v Yap Chai Kee [1922–1924] Volumes 3–4 FMS Law Reports 75
Quilter v Heatly (1883) 23 Ch D 42 (refd)
Rafidain Bank v Agom Universal Sugar Trading Co Ltd & Anor [1987] 1 WLR 1606; [1987] 3 All ER 859 (refd)
Ram Dyal Saligram v Nurhurry Balkrishna [1894] ILR 18 Bom 368 (refd)
Roberts v Oppenheim (1884) 26 Ch D 724 (refd)
Scott v Martin [1987] 2 All ER 813 (refd)
Teoh Peng Phe v Wan & Co [2001] 5 MLJ 149; [2001] 1 AMR 358 (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581 (refd)

Legislation referred to

Evidence Act 1950 ss 101, 106
Federal Constitution art 5
Rules of the High Court 1980 O 18 r 12, O 24 rr 2, O 24 r 10(1), O 24 r 10(2), O 24 r 16, O 24 r 16(1), O 26, O 27 r 2, Forms 43, 44
Rules of the Supreme Court 1875 [UK] Order XXXI r 12

YM Raja Aziz Addruse (Darshan Singh Khaira, Chan Kok Keong & Kok Check Keng with him) (Darshan Singh & Co) for the appellants/applicants.

Azizah binti Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondents/defendants.

Abdul Malik Ishak JCA (delivering judgment of the court):

THE BACKGROUND FACTS

[1] Cessation of armed activities between the Government of Malaysia and the Communist Party of Malaya was a welcome news for all Malaysians. It became a reality on 2 December 1989. On that date, an agreement was entered between the Government of Malaysia (the fourth respondent/defendant) and the Communist Party of Malaya (the second appellant/applicant) to terminate armed hostilities between the parties (hereinafter referred to as the 'agreement'). With the signing of the agreement, armed hostilities between the parties ended and peace prevailed. The terms of the agreement can be seen at p 235 of the appeal record at *Jilid* 1 ('ARJ-1'). There were four articles to that agreement and the relevant ones read as follows:

ARTICLE 3 – RESIDENCE IN MALAYSIA

3.1 Members of the Communist Party of Malaya and members of its disbanded armed units, *who are of Malaysian origin* and who wish to settle down in Malaysia, shall be allowed to do so in accordance with the laws of Malaysia.

3.2 Members of the Communist Party of Malaya and members of its disbanded armed units, *who are not of Malaysian origin*, may be allowed to settle down in MALAYSIA in accordance with the laws of MALAYSIA, if they so desire.

[2] The agreement was executed on behalf of the Malaysian Government by its representatives, namely, the first respondent/defendant (Menteri Hal Ehwal Dalam Negeri, Malaysia), the second respondent/defendant (Ketua Polis Negara Malaysia), and the third respondent/defendant (Ketua Angkatan Tentera Malaysia). The first appellant/applicant by the name of Ong Boon Hua @ Chin Peng (popularly known as 'Chin Peng' and will be referred to as such hereinafter), was the secretary-general of the Communist Party of Malaya (the second appellant/applicant), and together with two others, namely, Abdullah CD and Rashid Maidin signed the agreement on behalf of the Communist Party of Malaya (the second appellant/applicant).

[3] Again, on 2 December 1989, the parties to the agreement also agreed to sign an administrative arrangement which set out in detail the substance of what had been agreed between the parties in the agreement. And the same

representatives who signed the agreement also signed the administrative arrangement. There were several provisions in the administrative arrangement (see pp 236–245 of 'ARJ-1') and the relevant provisions read as follows:

ITEM 5 — RESIDENCE IN MALAYSIA

5.2 Members of the CPM and members of its disbanded armed units, *who are not of Malaysian origin*, may be allowed to take up residence in MALAYSIA, if they so desire, after having stayed in the pre-designated places in THAILAND for a minimum period of six months.

5.5 Those who wish to settle down in MALAYSIA shall be categorised as follows:

5.5.1 *Malaysian citizens*,

5.5.2 *Non-citizen* spouses and children of *Malaysian citizens*, and

5.5.3 Aliens.

5.7 *Non-citizen* spouses and children of those who are of *Malaysian origin* may be allowed to settle down in MALAYSIA in accordance with the laws of MALAYSIA if they so desire.

6.3 *Citizenship And NRICs*

6.3.1 Those who were in possession of Blue and Red NRICs and *citizenship certificates* before they joined the CPM or its armed units shall continue to use them as valid documents. Any such documents which have been lost or damaged shall be replaced expeditiously after verification.

6.3.2 *Non-citizen* spouses and children of those of *Malaysian origin* who have settled down in MALAYSIA shall be issued with RED NRICs. They can apply for citizenship after two years of continuous stay in MALAYSIA in accordance with the laws of MALAYSIA.

6.3.3 Those who are aliens and those whose *citizenship* have been revoked shall be issued with RED NRICs should they be allowed to settle down in MALAYSIA. They can subsequently apply for *citizenship* in accordance with the laws of MALAYSIA.

6.3.4 Those who are of *Malaysian origin* and who joined the CPM and its armed units before the implementation of National Registration, shall be issued with RED NRICs should they be allowed to settle down in MALAYSIA. They can subsequently apply for citizenship in accordance with the laws of MALAYSIA.

6.4 *Privileges And Obligations*

6.4.1 Those who are *Malaysian citizens* and have settled down in MALAYSIA shall enjoy the same privileges as any other citizens under the Federal Constitution and the laws of MALAYSIA.

6.4.2 Those not of *Malaysian origin* and *non-citizens* who have settled down in MALAYSIA shall be governed by the Federal Constitution and the laws of MALAYSIA.

ITEM 7 – PARTICIPATION IN POLITICAL ACTIVITIES

7.1 Members of the CPM and members of its disbanded armed units, who are *Malaysian citizens* are free to participate in political activities including the formation of a political party or parties within the confines of the Federal Constitution and the laws of MALAYSIA.

OBSERVATIONS

[4] Apart from the procedural aspects of the respondents/defendants' application for discovery and inspection, counsel on both sides also submitted on the merits of the said application and, consequently, the High Court judge considered them in his judgment. That approach should not be criticised nor faulted. Merits of the respondents/defendants' application should be considered in an application of this nature. Indeed before us, counsel on both sides submitted at length on them. We are constrained to say that although the merits of the case can only be considered at the trial proper, yet the peculiar nature of the respondents/defendants' application justify the parties to submit on them and for this court to consider them. The luxury of detachment from considering the respondents/defendants' application from the merits of the case can never be achieved. They must, invariably, be considered together in order to do justice to the parties.

THE APPELLANTS/APPLICANTS' APPLICATIONS

[5] Based on both the agreement and the administrative arrangement, the appellants/applicants filed three applications.

[6] Firstly, on 4 March 2005, the appellants/applicants filed an originating summons as seen at pp 10 to 13 of 'ARJ-1' for the following reliefs:

(a) a declaration that Chin Peng and all those persons represented by him have the right to enter, domicile, reside and stay in Malaysia;

(b) an order that the respondents/defendants grant permission and allow the appellants/applicants to enter Malaysia;

(c) an order that the respondents/defendants issue documents allowing the appellants/applicants to enter Malaysia;

(d) an order that the respondents/defendants comply with the terms of the agreement and the administrative arrangement dated 2 December 1989;

(e) costs; and

(f) any other ancillary order.

[7] An affidavit in support of the originating summons affirmed by Darshan Singh Khaira on 4 March 2005 as seen at pp 15–28 of 'ARJ-1', deposed to, inter alia, the following averments:

2. Plaintif pertama dilahirkan pada 20 Oktober 1923 di Sitiawan, Dinding, Perak, Malaysia. Ibubapa, anak-anak dan keluarganya juga adalah warganegara Malaysia.

3. Pada bila-bila masa pun plaintif pertama tidak pernah dilucut kewarganegaraan Malaysia dan tidak dibuang negeri dari Malaysia.

[8] The English language translations of Darshan Singh Khaira's affidavit in support are as follows:

2. The first plantiff (referring to Chin Peng) was born on 20 October 1923 in Sitiawan, Dinding, Perak, Malaysia. Both his parents, children and family members are Malaysian citizens.

3. The first plaintiff (referring to Chin Peng) has not, at any time, been deprived of his Malaysian citizenship and has not been banished from Malaysia.

[9] Secondly, on 7 March 2005, the appellants/applicants filed a summons in chambers as reflected at pp 33– 35 of 'ARJ-1' for the following orders:

(a) that Chin Peng be temporarily allowed to enter Malaysia and attend the hearing of this application;

(b) that a passport or an interim travelling document be issued to Chin Peng;

(c) that the respondents/defendants to obey the order and give effect to it accordingly;

(d) costs in the cause; and

(e) any other consequential order.

[10] Again, Darshan Singh Khaira affirmed an affidavit in support on 7 March 2005 in support of the summons in chambers and his affidavit in support can be seen at pp 37–40 of 'ARJ-1'. In his affidavit in support, Darshan Singh Khaira alluded to art 5 of the Federal Constitution and he pointed out that Chin Peng has the inherent right to appoint counsel of his own choice to act for him. The inherent right also extended, according to the deponent of the affidavit in support, to the right of Chin Peng to attend court for his case and for that purpose he has to enter Malaysia and give the necessary directions to counsel of his own choice as well as to affirm affidavits and to give evidence, if the need arises.

[11] Thirdly, on 12 March 2005, the appellants/applicants also filed another summons in chambers where they sought three orders, firstly, directing the respondents/defendants to furnish the list of the names of the members of the Communist Party of Malaya (the second appellant/applicant) who were desirous of entering and living in Malaysia and which list was handed to the respondents/defendants earlier by the appellants/applicants; and, secondly, directing the respondents/defendants to furnish the list of the names of the members of the Communist Party of Malaya (the second appellant/applicant) who were allowed to enter and live in Malaysia; and, thirdly, directing the respondents/defendants to furnish the list of the names of the appellants/applicants who were allowed to visit Malaysia. The usual costs and the ancillary order were also prayed for.

[12] This summons in chambers was supported by the affidavit in support of Darshan Singh Khaira that was affirmed on 12 March 2005 as reflected at pp 45–48 of 'ARJ-1'. In was a short affidavit and there he deposed briefly to the following facts. That immediately after the signing of the agreement, the appellants/applicants had given a list of the names of those who were qualified and entitled to enter and stay in Malaysia to the respondents/defendants and the said list was kept by the latter. That the respondents/defendants had allowed a large majority of the members of the Communist Party of Malaya (the second appellant/applicant) to enter and reside in Malaysia. That there were even members of the Communist Party of Malaya (the second appellant/applicant) who entered and visited Malaysia. That the respondents/defendants had issued the certificates of identity, travel documents and passports to members of the Communist Party of Malaya (the second appellant/applicant) to enter Malaysia. Again, it was averred that the said list showing the movements of the members of the Communist Party of Malaya, to and fro, from Thailand to Malaysia was kept by the respondents/defendants.

[13] Chin Peng himself affirmed an affidavit on 18 March 2005 proclaiming himself as a Malaysian citizen and an author with an address at c/o Visarn Pichienphati 1209/159 Parkland Road, Bagna, Bangkok 10260 Thailand. In that affidavit too, Chin Peng described himself as the former secretary general of the Communist Party of Malaya (the second appellant/applicant). Chin Peng's affidavit was filed on 28 March 2005 by the law firm of Darshan & Co and it was drafted in two languages — at pp 50–58 of 'ARJ-1' in the Malay language and at pp 59–68 of 'ARJ-1' in the English language.

[14] At para 7 of his affidavit, Chin Peng deposed in the Malay language as follows (see p 52 of 'ARJ-1'):

> 7. Selanjutnya, saya telahpun dilahirkan pada hujung Oktober 1924 di Sitiawan, Dinding, Perak, Malaya. Selama ini saya adalah seorang warganegara Malaysia dan kini masih adalah warganegara Malaysia. Saya tidak pernah melepaskan kewarganegaraan saya dan kewarganegaraan saya tidak pernah dibatalkan. Saya juga tidak pernah dibuang negeri.

[15] In the English language, this was what Chin Peng deposed to at para 7 of his affidavit as seen at p 61 of 'ARJ-1':

> 7. Further, I was born in the later half of October 1924 in Sitiawan, Dinding, Perak, Malaya. I have always been and remain a Malaysian citizen. I have never relinquished my citizenship nor has it been revoked. Neither have I been banished.

[16] Supporting the return of Chin Peng back to Malaysia is 76 years old Salim bin Hashim, a retired police personnel residing at No 283, Jalan Dato Kramat, Pulau Pinang. He affirmed an affidavit as reflected at pp 68–72 of 'ARJ-1' on April fool's day — and that would be on 1 April 2005. In the original Malay language text, this was what he deposed to at para 9 of his affidavit (see p 70 of 'ARJ-1'):

> Saya juga diberitahu bahawa plaintiff pertama (merujuk kepada Chin Peng) adalah merupakan warganegara Malaysia. Beliau telah berusia 80 tahun.

[17] The English language translation of Salim bin Hashim's affidavit of para 9 would read like this:

I am told that the first plaintiff (referring to Chin Peng) is a Malaysian citizen. He is 80 years of age.

The respondents/defendants' summons in chambers application under Order 24 of the Rules of the High Court 1980 ('the RHC') for discovery and inspection of the documents of Chin Peng

[18] The originating summons dated 4 March 2005 together with the summons in chambers dated 7 March 2005 and another summons in chambers dated 12 March 2005 (cumulatively referred to hereinafter as 'the appellants/applicants' three applications') that were filed by the appellants/applicants as alluded to above must have prompted the respondents/defendants to file their O 24 summons in chambers application under the RHC for discovery and inspection of the documents of Chin Peng. It did not help Chin Peng when he deposed in his affidavit that he was born in the later half of October 1924 in Sitiawan, Dinding, Perak, Malaya and that he has always been and remains a Malaysian citizen and that he has not relinquish his Malaysian citizenship nor has he been banished from Malaysia. The respondents/defendants wanted to see all the supporting documents to support Chin Peng's assertions.

[19] The respondents/defendants applied on 13 May 2005 by way of a summons in chambers as seen at pp 82–87 of 'ARJ-1' grounded on O 24 of the RHC for an order requiring Chin Peng to file in court, within 14 days of the order, the documents in question (the birth certificate and the citizenship certificate of Chin Peng and hereinafter it will be referred to as 'Chin Peng's documents'), in order to prove that Chin Peng was born in Malaysia or was a Malaysian citizen and, if he failed to do so, the appellants/applicants' three applications to be dismissed with costs. It was supported by an affidavit in support of Madam Azizah binti Haji Nawawi, the senior federal counsel, affirmed on 9 May 2005 as seen at pp 1–21 of the additional appeal record ('AAR').

[20] On 31 July 2007, the High Court allowed the respondents/defendants' application for discovery in accordance to the terms applied for (see the sealed order at pp 1–5 of the additional appeal record (2) ('AAR (2)'). This meant that the High Court also dismissed with costs the appellants/applicants' three applications. According to the High Court, the documents sought to be discovered must be relevant and related to the issue at hand. The High Court was also of the view that Chin Peng's assertions that he was entitled to return to Malaysia was not based on the agreement but rather on the strength of him being a Malaysian citizen. Being aggrieved, the

A appellants/applicants filed their appeal to this court against the whole decision of the High Court and also craved that the decision of the High Court be set aside with costs (see pp 205–209 of 'ARJ-1').

B **[21]** The respondents/defendants were not on a fishing expedition to discover Chin Peng's documents because they have been very specific as to what they were requesting for disclosure. This was certainly unlike the case of *Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan* [2004] 6 MLJ 235 where the court refused discovery because the documents were already before the court and the applicants there were said to be on a fishing C expedition.

[22] In a writ action, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have D been in his possession, custody or power relating to any matter in question between them in the action (O 24 r 2 of the RHC). In a writ action, discovery is automatic. There is no necessity, at all, for a prior order of the court.

E

[23] Here, before us, the proceedings were begun by originating summons and the discovery of Chin Peng's documents are not automatic. If discovery is required it must be done by way of an order of the court. That must have been the reason that prompted the respondents/defendants to apply to the F High Court seeking discovery of Chin Peng's documents which they asked for. A defendant is entitled to inspect documents referred to in the affidavit of the plaintiff (*Ram Dyal Saligram v Nurhurry Balkrishna* (1894) ILR 18 Bom 368; and *Khetsidas and Lachminarayan v Narotumdas Gordhandas and Another* [1908] ILR Bombay Series Vol XXXII p 152). Documents referred G to in the affidavit but not produced by the plaintiff, can be called for by the defendant by way of discovery and the defendant will have the right of inspection thereof (*Phoolchand Garg v Gopaldas Agarwal and others* AIR 1990 Madras 135, at p 140). The word 'discovery' is often used to mean disclosure and inspection (*Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149; [2001] 1 H AMR 358 at p 367). Thus, discovery would involve: (i) disclosure of the existence of the documents asked for; (ii) inspection of the documents once the documents are shown; and (iii) interrogatories under O 26 of the RHC which does not concern us here. Discovery is distinct from the process of obtaining further and better particulars of a pleading under O 18 r 12 of the I RHC and it is also not concerned about the process of obtaining unsworn admissions of fact under O 27 r 2 of the RHC.

[24] Order 24 r 10(1) of the RHC states that any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party

in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof. And O 24 r 10(2) of the RHC states that the party on whom a notice is served under para (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within seven days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

[25] The scope of O 24 r 10(1) of the RHC is quite wide. The area of inspection is certainly wider. Documents referred to in the pleadings or affidavits (here the documents were referred to in the affidavits) are now available for inspection and copies are permitted to be made under O 24 r 10(1) of the RHC. According to the case of *Gobinda Mohan Das and Ors v Kunja Behary Dass & Ors* [1909–1910] Calcutta Weekly Notes, Volume XIV p 147, the right to inspection includes the right to take notes and obtain copies. And according to the case of *Lewis v The Earl of Londesborough* [1893] 2 QB 191, if necessary, the court can even order that photograph to be taken of the documents. Of significance would be this. That permission to take photocopy of documents cannot be refused merely on account that these documents have not become part of the record of the suit (*Jagatbhai Punjabhai Palkhiwala & Ors v Vikrambhai Punjabhai Palkhiwala & Ors* 1985 AIR Vol 72, Gujar at p 112).

[26] The party to whom the notice is given must produce the documents unless he can show good cause as to why inspection ought not to be allowed. The onus is thus on him to justify his refusal. Here, notice was given to Chin Peng through Messrs Darshan Singh & Co as seen at pp 74–76 of 'ARJ-1'. This was followed, as alluded to earlier, by a summons in chambers filed by the respondents/defendants on 13 May 2005 based on O 24 r 16 of the RHC (see pp 83–87 of 'ARJ-1') that within 14 days if Chin Peng failed to produce the required documents to prove that he was born in Malaysia or was a Malaysian citizen, the appellants/applicants' three applications would be dismissed with costs. Order 24 r 16 of the RHC are worded in this way:

16 Failure to comply with requirement for discovery, etc (O 24 r 16)

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that

order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed, or as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) A solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

[27] Rule 16(1) of O 24 of the RHC should apply to the appellants/applicants. The effect of non-compliance is quite severe. It provides that 'the court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly'. It is the court that will make the order dismissing the appellants/applicants three applications with costs even though such a prayer appears in the summons in chambers of the respondents/defendants dated 13 May 2005. And such an order was made by the High Court on 31 July 2007 as seen at pp 1–5 of 'AAR(2)'. We do not see anything wrong with the order of the High Court. The onus was on Chin Peng to produce his birth certificate and his citizenship certificate. It was Chin Peng who deposed in his own affidavit, as alluded to earlier, that he was born in the later half of October 1924 in Sitiawan, Dinding, Perak, Malaya and that he remains a Malaysian citizen. Chin Peng also averred that he did not relinquish his citizenship and neither was he banished from Malaysia.

[28] Chin Peng emphasised his Malaysian citizenship in his affidavit. Even Darshan Singh Khaira in his affidavit that was affirmed on 4 March 2005 alluded to Chin Peng's Malaysian citizenship and the averment that Chin Peng was born on 20 October 1923 in Sitiawan, Dinding, Perak, Malaysia.

[29] It must be recalled that the senior federal counsel in the person of Madam Azizah binti Haji Nawawi has affirmed an affidavit in support on 9 May 2005 as seen at pp 1–21 of 'AAR'. There she averred that the respondents/defendants were not in possession of Chin Peng's documents and she believed that Chin Peng should have those documents with him and he should, therefore, forward it to the respondents/ defendants. She also averred that the Registration Department has no record of the birth certificate of Chin Peng and neither was there a certificate of citizenship of Chin Peng registered with or in the possession of the respondents/ defendants. According to her, Chin Peng's documents were important and relevant to the issue pertaining to the citizenship of Chin Peng since the latter had affirmed an affidavit to say that he is a Malaysian citizen.

[30] Haji Ab Rahim bin Ismail from the Immigration Department affirmed an affidavit in reply on 14 May 2005 as seen at pp 77–81 of 'ARJ-1' and there he asserted that Chin Peng was not entitled to be issued with a Malaysian passport unless he is a Malaysian citizen.

[31] I must now refer to two more affidavits. One was affirmed by Darshan Singh Khaira on 22 July 2005 as seen at pp 121–125 of 'ARJ-1'. The other was affirmed by Chin Peng on 4 December 2006 as reflected at pp 160–167 of 'ARJ-1'. The contents of both these affidavits are similar and they may be summarised as follows:

(a) that all the documents and certificates were issued by the respondents/defendants and they should be in the possession of the respondents/defendants;

(b) that Chin Peng was born in Sitiawan, Dinding, Perak and the same was also true for his brothers and sisters;

(c) that Chin Peng's children were also born in Sitiawan, Dinding, Perak and the whole family also resided in Perak;

(d) that in 1947, the Jabatan Pendaftaran, Sitiawan, Perak issued a birth certificate to Chin Peng and the latter was also issued with a British nationality passport to enable him to travel to Hong Kong and Bangkok but, unfortunately, both the documents were seized by the police;

(e) that Chin Peng was issued with a travel document entitled 'Travel Document For Alien' by both Thailand and China and there Chin Peng's nationality was stated to be 'Malaysia';

(f) that Chin Peng has ten siblings and his parents are said to be Malaysian citizens; and

(g) that Chin Peng's wife and two children are said to be Malaysian citizens.

[32] The director of the Registration Department by the name of Hj Zainuddin bin Ramli affirmed an affidavit in reply on 20 September 2006 as seen at pp 135–143 of 'ARJ-1' and there he deposed to the following set of facts:

(a) That the National Registration Department ('NRD') is tasked with the duty of registering the birth of an individual in Malaysia by the issuance of a birth certificate and it is also under a duty to record, register and keep copies of applications for citizenships and National Registration of Identity Cards ('NRICs').

(b) That the NRD would only keep the records of those documents that were registered with them. Thus, if the fact of a birth of a child is not registered with the NRD or there is no application for citizenship or for an NRIC, then the NRD would not know of that fact nor would it keep the records of the relevant documents.

(c) That the NRD has no record of the birth of Chin Peng at Sitiawan, Dinding, Perak. There is no registration of the birth of Chin Peng with the NRD and, consequently, the NRD has not issued a birth certificate to Chin Peng.

(d) That both the parents of Chin Peng, namely, Ong Sing Pio and Kuan Kheng Dee became Malaysian citizens after their applications for Malaysian citizenships were approved by the Government.

[33] The principles governing discovery were set out by the English Court of Appeal way back in 1882 in the case of *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55. That case concerned the filing by the plaintiffs there of a further affidavit of documents pursuant to the English Rules of the Supreme Court 1875, Order XXXI r 12 thereof. Brett LJ writing a separate judgment for the Court of Appeal aptly laid down the principles of law in these fine language (see pp 62–63 of the report):

> The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the

affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences... A B

[34] I must categorically say that the documents that relate to the matters in question are Chin Peng's documents that are likely to throw light on the case at hand (*Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196, at p 210). C

[35] Edgar Joseph Jr SCJ sitting at the High Court of Penang in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 quoted verbatim the above mentioned passage of Brett LJ and, in his usual candour, continued to say at p 585 of the CLJ report: D

The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought. E

[36] Further down the same page, His Lordship Edgar Joseph Jr SCJ had this to say:

As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute. F

More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' [Rules of the High Court, O 24 r 1(1)] or 'relating to any matter in question in the cause or matter' [O 24 r 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v Phillips* [1879] 40 LT 815, 821). In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. (See *George Ballantine & Sons Ltd v Dixon & Son Ltd* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices. G H

[37] Continuing further on the same page, this was what His Lordship Edgar Joseph Jr SCJ said: I

A The observation of Edward Bray in his highly regarded work on discovery at p 18 as to the test of 'materiality' merits quotation; there he says this:

> … for the purpose of testing the materiality of the discovery to a particular issue … it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

B

I note that proposition received judicial approval in *Format Communications Mfg Ltd v ITT (UK) Ltd* [1983] FSR 473 (CA)

C **[38]** Under O 24 r 10 of the RHC, the court has the jurisdiction to order discovery of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose affidavit the reference to that document is made (*Rafidain Bank v Agom Universal Sugar Trading Co Ltd & Anor* [1987] 1 WLR 1606; [1987] 3 All ER
D 859 (CA)). The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession custody or power may amount to a good cause, but it is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case (*Quilter v Heatly*
E (1883) 23 Ch D 42, at pp 48–51 (CA)). Privilege may be a good cause not to allow discovery. Thus, the party against whom the order is sought will be excused if, and only if, he is privileged from producing the document asked for (*Roberts v Oppenheim* (1884) 26 Ch D 724; and *Milbank v Milbank* [1900] 1 Ch 376). And 'privilege' has not been raised by Chin Peng. At any
F rate, Chin Peng's documents can never be classified as privileged so as to prevent him from producing them.

[39] Here, there was an averment that Chin Peng's birth certificate that was issued by the Registration Department of Sitiawan, Perak in 1947 was seized
G by the police and so Chin Peng says that he could not produce his birth certificate. There is a rebuttal evidence from the director of the Registration Department who categorically stated that there was no record of the birth of Chin Peng at Sitiawan, Dinding, Perak. Now, since Chin Peng says that he was born in Sitiawan, Dinding, Perak, Malaya, the onus was on him to show
H that that was so. He must produce his birth certificate. Chin Peng too must produce his citizenship certificate because the NRD has no record of it. The production of Chin Peng's documents would certainly throw light to the case at hand. It would support Chin Peng's claim that he is a Malaysian. It would prove his citizenship.

I

[40] Even if Chin Peng were to raise 'privilege' as the reason in not producing those documents (which he did not), in the face of the evidence from the director of the Registration Department 'privilege' cannot amount to a good cause. As I said the decision to order discovery would be dependent on the facts of each case.

[41] There is a passage of critical importance appearing in *Odgers' Principles of Pleading and Practice* (22nd Ed) by DB Casson and IH Dennis which merits reproduction. There at pp 238–239, the learned authors wrote:

> *Default in Making Discovery*
>
> If any party fails to discover or produce or allow inspection of documents as provided by any of the foregoing rules, or as ordered, the court has power under rule 16(1) to make any order it thinks just. This includes, in particular, the power to order that an action be dismissed, or that a defence be struck out with judgment to be entered accordingly (*Salomon v Hole* [1905] 53 WR 588; and *Husband's of Marchwood Ltd v Drummond Walker Developments Ltd* [1975] 1 WLR 603). Normally, however, the court is reluctant to exercise such power and will only do so when a party has at least once disobeyed a peremptory order insisting, for example, that he make discovery within a time specified in the order. A party who fails to comply with an order for discovery or production is also liable to committal [rule 16(2)]. These are highly penal provisions and will only be enforced in the last resort, where it seems clear that the party in default really intends not to comply with an order of the court.

[42] In *Mahfar Alwee v Jejaka Megah Sdn Bhd & Anor* [2007] 4 MLJ 175; [2007] 7 CLJ 116, Low Hop Bing J (now JCA) refused to accede to the plaintiff's application to produce certain documents because His Lordship was unable to find any relevance of those documents especially when the plaintiff's cause of action was not founded on contract but rather on fiduciary duties and implied trust. In the course of writing the judgment, His Lordship sets out the law in regard to discovery and inspection of documents and His Lordship vigorously applied the principles of law enunciated by Edgar Joseph Jr SCJ in *Yekambaran s/o Marimuthu v Malayawata Steel Berhad* as reproduced earlier.

[43] Before us, Raja Aziz Addruse, learned counsel for the appellants/applicants, submitted along the following lines. That Chin Peng is of Malaysian origin and he is entitled to come back to Malaysia. That Chin Peng's documents are irrelevant to the issue of Malaysian origin. It would not be prejudicial to anyone if Chin Peng cannot produce those documents. That Chin Peng's birth certificate was lost when he tried to escape from capture.

[44] After referring to the affidavit in reply of the director of the Registration Department, Raja Aziz Addruse submitted that at the trial, the court would be in a position to decide whether Chin Peng is of Malaysian origin notwithstanding the fact that he may not be born in Malaysia. There were affidavits, according to learned counsel, that showed that Chin Peng grew up in Malaysia and that he will be caught under the category of being a person of Malaysian origin. Learned counsel further submitted that Chin Peng's right to return and live in Malaysia is based on the agreement. He stressed that Chin Peng had satisfied the terms of the agreement to enable him to live in Malaysia. He argued that the agreement has to be read contemporaneously with the administrative arrangement and I agree with him (*Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd* [2006] 4 MLJ 302). He then referred to Item 6 of the administrative arrangement, in particular, para 6.3.4 as seen at p 243 of 'ARJ-1' which has been reproduced earlier.

[45] And notwithstanding that the discretion was for the Government of Malaysia — the fourth respondent/defendant, to decide 'whether they should be allowed to settle down in Malaysia' by virtue of para 6.3.4 of the administrative arrangement, Raja Aziz Addruse submitted further and he addressed this court in this fashion, and I quote:

> When he (referring to Chin Peng) went to the jungle he is allowed to come back if he can show that he has a Malaysian origin. If he is allowed to come back and he does not have NRIC or citizenship then under para 6.3.4 of p 243 of 'ARJ-1' (referring to the administrative arrangement) he would be entitled to get his citizenship.

[46] According to Raja Aziz Addruse, under the agreement the people of Malaysian origins are allowed to settle in Malaysia and there was no necessity to prove it with a birth certificate or citizenship papers.

[47] In regard to the respondents/defendants summons in chambers application for discovery and inspection of Chin Peng's documents, it was submitted that there was no requirement that if those documents were not produced for inspection then the appellants/applicants' three applications would be dismissed. With respect, that cannot be right. In actual fact, there was prayer 3 to the summons in chambers of the respondents/ defendants (see p 85 of 'ARJ-1') which categorically stated that if Chin Peng's documents were not produced for inspection then the appellants/applicants' three applications would be dismissed with costs. And the High Court had made the order accordingly. That order by the High Court was certainly good in law.

[48] Madam Azizah binti Haji Nawawi argued that the Government of Malaysia was not in possession of Chin Peng's documents and she believed that Chin Peng — the former communist leader, possessed them. She rightly submitted that Chin Peng's documents were relevant as it would prove his citizenship. She was also right when she argued that the onus was on Chin Peng to produce those documents because he had attested that he had never given up his citizenship and neither was it revoked.

[49] The expression 'burden of proof' is self-explanatory. It simply means the obligation to prove. In this judgment, I am only concerned with one principal kind of burden. It is the legal burden. A legal burden is defined as the obligation imposed on a party by a rule of law to prove a fact in issue. And the standard of proof required to discharge the legal burden depends upon whether the proceedings are civil or criminal. In the former, the standard required is proof 'on the balance of probabilities'. In the latter, the standard required of the prosecution is proof 'beyond reasonable doubt'. In a negligence action, for example, where the defendant alleges contributory negligence: the plaintiff bears the legal burden on the issue of negligence while the defendant has to prove contributory negligence. By way of an analogy, reference should be made to the case of *Scott v Martin* [1987] 2 All ER 813 (CA) at p 817, where Nourse LJ, in construing a conveyance, said that the party who relies on surrounding circumstances as an aid to construction has the onus to prove them. Likewise here, the onus falls on Chin Peng to prove that he is a Malaysian citizen as claimed by him. If you say that you are a Malaysian citizen, where's the proof to support your claim?

[50] The legal burden is often determined by the rules of substantive law set out in the predecents and statutes. As far as the statute is concerned, I must call in aid s 106 of the Evidence Act 1950 (Act 56). That section enacts as follows:

> Burden of proving fact especially within knowledge
>
> 106 When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> ILLUSTRATIONS
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[51] Concisely put, it amounts to this. If a person asserts affirmatively that a certain state of facts is present or absent, that would be an averment that he is bound to prove. Section 106 of the Evidence Act 1950 (Act 56) is an exception to s 101 of the same Act. Buttrose J in *Ho Tong Cheong & Ors v Oversea-Chinese Banking Corpn Ltd* [1967] 2 MLJ 70 FC, aptly said at p 71 of the report, in the context of when any fact is 'especially' within the knowledge of any person, to this effect:

> The fact as to whether the defendants knowingly committed the breaches complained of was surely something especially within their own knowledge.

[52] The determination of where the legal burden falls is a matter of plain common sense. The latin phrase that says *Ei incumbit probatio qui dicit, non qui negat* is quite apt. Loosely translated it means this. That he who asserts must prove. The law books are replete with authorities on this latin maxim and its meaning. The Indian court in*Pachkodi Gulab Badhai v Krishnaji & Ors* 1947 AIR Vol 34 Nagpur 145 held that where a document containing material alterations was produced from the custody of the person who had possession of it, that person has to explain where and how the alterations were made. The Court of Appeal in *Public Prosecutor v Yap Chai Kee* [1922–1924] Vols 3–4 FMS Law Reports 75 held that since the accused was in possession of two forged rubber coupons it raised a presumption that he knew that they were forged. Likewise here, it was especially within the knowledge of Chin Peng who knew of the existence of his birth certificate and citizenship certificate and, consequently, the burden of proving that he had them is on him.

[53] The relevancy of being a Malaysian citizen as opposed to being a person of Malaysian origin was highlighted in the appellants/applicants summons in chambers dated 7 March 2005 as alluded to in the early part of this judgment. In that summons in chambers, Chin Peng sought to have access to a Malaysian passport and he was asking the Malaysian Government to grant him a passport to enable him to attend court. Chin Peng's affidavit affirmed on 18 March 2005 alluded to, at para 7 of p 61 of 'ARJ-1', the issue of Malaysian citizenship. Nothing was mentioned about Malaysian origin in that paragraph. In drafting an affidavit, certain drafting principles must be adhered to. The most basic principle is succinctness. An affidavit must be as short as possible without sacrificing the content and effect of the evidence. There must be precision in language and the draftsman has admirably done that in para 7 of p 61 of 'ARJ-1'. So, effect must be given to such an averment.

[54] When Chin Peng asked the Malaysian Government to give him a passport to enable him to attend court, it brought into sharp focus the question of citizenship. Item 5.5 of the administrative arrangement at p 241 of 'ARJ-1', item 5.7 of the administrative arrangement also at p 241 of 'ARJ-1', items 6.3.1 and 6.3.2 of the administrative arrangement at pp 242 to 243 of 'ARJ-1', and items 6.3.3, 6.3.4, 6.4.1 and 6.4.2 of the administrative arrangement at p 243 of 'ARJ-1' are relevant. They all made references to 'citizens' and 'non-citizens' and they have been reproduced earlier. That being the case, the citizenship issue becomes a very important issue. It is propelled to the forefront. In sharp contrast, the phrase 'Malaysian origin' was only emphasised after the respondents/defendants filed their originating summons on 13 May 2005 as seen at pp 83 to 87 of 'ARJ-1' that was hinged on O 24 of the RHC. In fact, Chin Peng affirmed an affidavit on 14 March 2007 as seen at pp 189–194A of 'ARJ-1' and there he raised the issue of Malaysian origin for the very first time. As I said, an affidavit must be drafted with precision and clarity. The appropriate words must be employed. Thus, when Chin Peng affirmed an affidavit on 18 March 2005 in both the Malay and the English languages as alluded to in the early part of this judgment, he must have employed the appropriate words. Consequently it must be noted that in that affidavit that was affirmed on 18 March 2005, Chin Peng made reference to being a Malaysian citizen and not as a person of Malaysian origin.

[55] Chin Peng also reiterated in his affidavit that was affirmed on 14 March 2007 that he was born in Sitiawan, Perak at his parents shophouse in October 1924. He too averred that his birth was duly registered and that he once possessed a formal copy of his birth certificate. And according to him, he had placed a copy of his birth certificate in the pocket of the suit which he abandoned at the Tong Ching bungalow, outside Kampar, on the evening of 16 June 1948, when he narrowly escaped capture by a British-led police raid on that residence. According to him, the police had seized his abandoned belongings including his birth certificate. He averred that the full details of the raid can be found in Chapter 14 of his published memoirs entitled *Alias Chin Peng — My Side of History*. With respect, what is written in Chin Peng's memoirs cannot be accepted as the gospel truth. Anything can be written in the memoirs. The bottom line is this: where are your documents? The onus is on Chin Peng to produce them.

[56] Be that as it may, in my judgment, Chin Peng's documents are still required in order to ascertain the issues of 'Malaysian citizen' or 'Malaysian origin'. It is imperative, in view of the affidavits of the officers from the

Immigration and Registration Departments, that Chin Peng should produce his documents for inspection. In this context, the High Court judge was wrong when he acknowledged that one can prove one's Malaysian origin by other means.

[57] You may be a Malaysian by origin by virtue of being born in Malaysia but you have since acquired, say, Australian citizenship. To prove your Malaysian origin, you need to produce your birth certificate and citizenship certificate. This is also true for Chin Peng. On both counts — be it as a Malaysian citizen or as a person of Malaysian origin, Chin Peng has to produce his birth certificate and citizenship certificate for inspection. There are no two ways about it. These two documents are certainly important to ascertain the status of Chin Peng.

[58] The High Court decided on the basis of the respondents/defendants' application under O 24 of the RHC. The appeal before us, pure and simple, revolved on O 24 of the RHC and nothing else. We cannot go further than that.

[59] The failure on the part of Chin Peng to produce those documents sought by the respondents/defendants for inspection was fatal. Discovery was not given by the stated time and at the end of that time since the discovery has not been given, the High Court was right in allowing the respondents/defendants' application under O 24 of the RHC with costs in the cause and, finally, dismissing the appellants/applicants' three applications forthwith with costs (see p 4 of 'AAR(2)').

[60] It is always prudent to remember that O 24 r 16(1) of the RHC gives power to the court to order, for instance, that the defence be struck out and that judgment be entered accordingly unless the party complies with the rule or order for discovery by the stated hour of the stated day (see the Supreme Court Practice (1985 Ed) at p 417, at 24/16/1). Here, the High Court was right in dismissing the appellants/applicants' three applications for their failure to produce for inspection Chin Peng's documents.

[61] For all these reasons, we unanimously affirmed the decision of the High Court. All the orders of the High Court as seen in the sealed order at p 1 to 5 of 'AAR(2)' are hereby affirmed. The appellants/applicants' appeal are accordingly dismissed with costs.

[62] My learned brothers, Low Hop Bing JCA and Sulaiman Daud JCA, have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon